

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KELLY MABE)	
Claimant)	
VS.)	
)	Docket Nos. 174,765 & 222,521
RAYTHEON AIRCRAFT COMPANY)	
Respondent)	
Self-Insured)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Both the respondent and the Workers Compensation Fund appealed the March 2, 1999 Award entered by Administrative Law Judge Jon L. Frobish.

APPEARANCES

Jack Shelton of Wichita, Kansas, appeared for the claimant. Jeff C. Spahn, Jr., of Wichita, Kansas, appeared for the respondent. Christopher J. McCurdy of Wichita, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

Docket No. 174,765 is a claim for an October 26, 1992 accident and resulting back injury. Docket No. 222,521 is a claim for a back injury that allegedly occurred from 1991 through April 2, 1997. The Judge found that claimant had a 10 percent permanent partial general disability as the result of the October 26, 1992 accident and the natural progression of the resulting back injury.

Both the respondent and the Workers Compensation Fund contend the Judge erred. The respondent argues that claimant failed to prove that he sustained any functional impairment resulting from the October 1992 accident. Respondent argues that claimant sustained other injuries to his back off the job, which he did not reveal to the

doctor who rated him, and that claimant even failed to tell the doctor about the alleged October 1992 accident. Further, the respondent argues that the Judge erred by awarding benefits based upon a functional impairment rating that was based on the fourth edition of the AMA Guides.

The Workers Compensation Fund contends the claimant failed to prove that he sustained any permanent impairment from his work. Alternatively, the fund argues that the Judge erred by attributing all of claimant's functional impairment to the October 1992 accident.

The only issues before the Board on this appeal are:

1. Did claimant sustain any permanent injury or impairment working for the respondent on either October 26, 1992, or during the period from 1991 through April 2, 1997?
2. If so, what is the nature and extent of the injury and impairment for each of the claimed accidents?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. Kelly Mabe worked as a sheet metal assembler for Beech Aircraft Company, which is now known as the Raytheon Aircraft Company.
2. In approximately 1991, Mr. Mabe hurt his low back at work helping to move a jig. He immediately reported the pain both to a coworker and his crew chief, Jessie Wood. The company then referred Mr. Mabe to the company doctor, who took him off work for approximately four weeks and started Mr. Mabe on physical therapy.
3. When the company doctor released Mr. Mabe to return to work, the doctor gave him a 25 pound weight lifting restriction, which was later modified to a permanent 50 pound lifting restriction. Despite ongoing low back pain, Mr. Mabe continued to work at Beech taking pain pills at night and consulting both his family physician and family chiropractor.
4. Knowing that Mr. Mabe was having back problems, Beech placed him in a job working with small parts where he was not required to lift and where he could sit, if needed.
5. At some unidentified time, the company transferred Mr. Mabe from small parts to a job that required him to stand all day and do a lot of lifting. Although Mr. Mabe told his supervisors the new job would be a problem because of his back condition, the company transferred him anyway. Mr. Mabe described an alleged 1997 accident, as follows:

When they transferred me over there I told the crew chief at that time, I told her my back had already been hurting due to standing and she said, well, just be careful. And I was working the kiln assembly, the front part, and the way it's designed you have to get down underneath it. And you have to use a long drill bit to drill out specific holes that you have to put rivets in. And when I got down to get underneath it there I twisted and felt the same pop in my back the same kind of pain that I felt back in 1991. I knew that I had done something again. Because it hurt really bad. On a scale of one to ten it was probably a nine hurt. I knew I had done something. I told the crew chief and even around this time it was around 3:00 o'clock and she said go to first aid.

6. Although he does not remember the date, Mr. Mabe also testified he hurt his back and missed approximately three weeks of work when he missed the bottom step of a step stool and spun around to grab a guard rail. Immediately after that incident, Mr. Mabe could not walk and others took him to first aid in a wheelchair. The chiropractic records introduced at Dr. Philip R. Mills' deposition describe a similar incident occurring on August 11, 1996. But the medical records from Dr. James E. Logan, Mr. Mabe's family physician, describe a similar incident in notes dated March 15, 1993.

7. The morning after the 1997 incident, Mr. Mabe saw his family doctor, Dr. Logan, who restricted him from working for two months and eventually released him to return to work with additional permanent restrictions. When Mr. Mabe's foreman determined that he could not accommodate those new restrictions, the company provided a different job. Mr. Mabe continued to work for the company until July 29, 1998, when he voluntarily terminated.

8. Mr. Mabe contends that his job aggravated his back every day that he worked between those incidents he described as occurring in 1991 and in 1997. But, he also admits that he hurt his back off the job several times during that period of time. For example, in April 1996 Mr. Mabe told his chiropractor he hurt his back and it popped when he jumped off a porch running from his dad. Also, in September 1996 Mr. Mabe told his chiropractor he hurt his back and it popped while recently moving furniture. He also told his chiropractor in September 1996 and in November 1996 that he hurt his back and it popped while recently sneezing. Finally, he told his chiropractor he hurt his back in March 1997 at church. At that time, Mr. Mabe was climbing a ladder and it slipped leaving him hanging from a rafter.

9. In addition to the incidents Mr. Mabe reported to his chiropractor, Beech's first aid department has notes from March 1996 indicating Mr. Mabe had recently hurt his back bowling.

10. Dr. Philip R. Mills, who is board certified in physical medicine and rehabilitation, examined Mr. Mabe at his attorney's request in August 1997. The physical examination

revealed decreased left lateral flexion, painful bilateral rotation, and pain when standing up from a squatting position. Dr. Mills diagnosed a low back strain with an underlying congenital small spinal canal and bulging disks, all of which the doctor rated as a 10 percent whole body functional impairment using the fourth edition of the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides).

11. According to Dr. Mills' August 4, 1997 report, Mr. Mabe told him about two earlier back injuries in 1991 and 1993. Mr. Mabe did not tell the doctor about hurting his back bowling, jumping off a porch, moving furniture, sneezing, or hanging from a rafter.

12. After receiving Dr. Mills' August 4, 1997 report, Mr. Mabe's attorney forwarded Dr. Mills additional medical records and requested the doctor to apportion the functional impairment between the claimed 1992 and 1997 work-related incidents. After reviewing those records, Dr. Mills evenly apportioned the 10 percent functional impairment rating between the previously unidentified 1992 injury and the April 1997 injury that appears to match Mr. Mabe's description of the 1997 work-related incident, assigning 5 percent to each.

CONCLUSIONS OF LAW

1. The Award should be modified to reduce it to one for a 5 percent permanent partial general disability for an accident occurring on or about April 2, 1997.

2. When stipulations were taken, Mr. Mabe limited his claim for permanent partial disability benefits to the functional impairment rating.

3. The Board finds that Mr. Mabe did not prove that he permanently injured his back working for Beech Aircraft in October 1992. The record is such that it does not establish Mr. Mabe's physical condition after the claimed October 1992 incident. Although the parties stipulated that Mr. Mabe sustained an accident on that date, the record fails to establish how it occurred or that Mr. Mabe experienced any residual impairment or symptoms.

4. The Board concludes that Mr. Mabe has proven by the narrowest of margin that he injured his back working for Raytheon in April 1997 which resulted in an additional 5 percent whole body functional impairment. That conclusion is supported by Dr. Mills' opinions.

5. Because Mr. Mabe sustained a back injury, his entitlement to permanent partial general disability benefits is governed by K.S.A. 1996 Supp. 44-510e, which provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the

physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Because Mr. Mabe has limited his permanent partial general disability claim to the functional impairment rating, his permanent partial general disability is 5 percent.

6. The Board finds that the appropriate accident date for this award of permanent partial general disability benefits is April 2, 1997. The Workers Compensation Act was amended effective April 4, 1996, to provide that injured workers' functional impairments were to be rated using the fourth edition of the AMA Guides.¹ Therefore, Dr. Mills' use of the fourth edition of the Guides was proper.

AWARD

WHEREFORE, the Appeals Board modifies the March 2, 1999 Award to reduce the 10% permanent partial general disability that was awarded for an October 1992 accident to a 5% permanent partial general disability for an April 2, 1997 accident.

In docket No. 222,521, Kelly Mabe is granted compensation from Raytheon Aircraft Company for an April 2, 1997 accident and the resulting 5% permanent partial general disability. Mr. Mabe is entitled to 20.75 weeks of permanent partial disability benefits at the maximum rate of \$338 per week for a total award of \$7,013.50, which is all due and owing less any amounts previously paid.

For the stipulated October 2, 1992 accident in Docket No. 174,765, Mr. Mabe is entitled to receive the \$128.57 in temporary total disability benefits and the medical benefits from Raytheon and the Workers Compensation Fund as granted in the Award. The request for permanent partial disability benefits for this accident is denied.

The Board hereby adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

¹ K.S.A. 1996 Supp. 44-510e(a).

IT IS SO ORDERED.

Dated this ____ day of June 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jack Shelton, Wichita, KS
Jeff C. Spahn, Jr., Wichita, KS
Christopher J. McCurdy, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director